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No. 80-201

In the Supreme Court of the United States

OCTOBER TERM, 1980

SILVER CREEK PACKING CO., PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner's farm labor contracting activity is not "solely for [its] own operation" and is thus not exempt from the Farm Labor Contractor Registration Act of 1963, 7 U.S.C. 2041 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 32-39) is reported at 615 F. 2d 848. The opinion of the district court (Pet. App. 28-31) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1980. On June 12, 1980, Mr. Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to August 8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In January 1976, the Secretary of Labor instituted the present action in the United States District Court for the Eastern District of California to enjoin petitioner from engaging in farm labor contracting activities without first obtaining a certificate of registration from the Secretary pursuant to the Farm Labor Contractor Registration Act of 1963, 7 U.S.C. 2041 *et seq.* The district court concluded (Pet. App. 31) that petitioner's contracting activities are undertaken "solely in its own behalf" and that it is therefore exempt from the requirements of the Act under 7 U.S.C. 2042(b)(2), which excludes "any * * * packing shed operator * * * who personally engages in [farm labor contracting activity] for the purpose of supplying migrant workers solely for his own operation." The court of appeals reversed, holding (Pet. App. 36) that "[b]ecause the growers are dependent on [petitioner's] farm labor contracting, those activities cannot be 'solely' for" petitioner's own operation.

The material facts are not in dispute. Petitioner picks and packs cantaloupes grown by individual farmers (Pet. App. 33). The growers prepare the land and plant, thin,

fertilize and irrigate the melon crop (Tr. 31-32).[1] Pursuant to its marketing agreements with melon growers, petitioner controls the harvesting, hauling, packing, shipping, and sale of the growers' crops (Pet. App. 30). In order to harvest the growers' crops, petitioner recruits and employs migrant workers (*id.* at 33). Those workers are housed in a labor camp owned and operated by petitioner and are transported to the growers' fields in buses owned by petitioner (R. 16).[2]

Petitioner reaps a profit in the form of a "packing expense," which includes all of its costs plus a set profit margin (Pet. App. 33). This packing expense is deducted "off the top" from the proceeds obtained when the melons are sold; the balance of the proceeds is then passed on to the growers (*ibid.*). All costs of harvesting, hauling, packing, and selling the growers' melon crops (as well as charges levied by the State of California for melon research and disease control) are ultimately borne by the growers when petitioner makes its packing expense deduction (R. 71, 23).

ARGUMENT

The court of appeals correctly rejected petitioner's claim of exemption. There is no conflict among the circuits on this issue, and further review by this Court is unwarranted.

A packing shed operator that employs migrant workers is a farm labor contractor under the Farm Labor Contractor Registration Act of 1963, 7 U.S.C. 2042(b). However, such an operator is exempt from the Act's requirements if it engages in its farm labor contracting activity "solely for [its] own operation." 7 U.S.C.

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[1] "Tr." refers to the August 2, 1977 proceedings in the district court.

[2] "R." refers to the record in the court of appeals.

2042(b)(2). The only question is whether petitioner's hiring and harvesting activities are conducted solely for its own operation.

Petitioner does not deny that the growers whose crops it harvests have a direct stake in its activities. It does not deny that its own profit is realized first, and that the sale price of the crop must exceed its "packing expense" in order for the grower even to recover his costs. In light of these undisputed facts, the court of appeals' conclusions that the grower is directly dependent on petitioner's activities and that those activities thus are not "solely" for petitioner's own benefit are unassailable.

Petitioner correctly states (Pet. 18-25) that Congress has decreed that the "economic realities" of a situation must govern the question of exemption under the Act. Where title rests at a given time thus is not determinative, as Congress noted in amending the Act in 1974. H.R. Rep. No. 93-1493, 93d Cong., 2d Sess. 8 (1974); S. Rep. No. 93-1295, 93d Cong., 2d Sess. 7 (1974). However, Congress has never suggested that the question of title is irrelevant. And, in a situation like this, a significant economic reality is that title to the crops remains in the grower and never passes to the packing shed operator. Thus, the grower has a vested interest in the operator's activities, which are undertaken both in the operator's own interest *and* in the interest of the grower. As the court of appeals pointed out (Pet. App. 35-36), "[i]f their melons are not picked, the growers receive nothing."[3]

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[3]Contrary to the suggestion of amicus Nisei Farmers League (Br. 15), the court of appeals nowhere held that "the title to the crop at the time of harvest is determinative * * *."

The court of appeals noted (Pet. App. 35) that the situation in the instant case differs significantly from that in *Marshall* v. *Green Goddess Avocado Corp.*, 615 F. 2d 851 (9th Cir. 1980). There, growers sold their crops to Green Goddess, the farm labor contractor, while they were still on the trees. Thus, it did not matter to the growers whether the fruit was picked; they had been paid. If the crop spoiled, Green Goddess—which harvested, marketed and sold the fruit—took the total loss. Therefore, as the court stated, Green Goddess' contracting activities were solely for its own operation. It alone had an interest in the work performed by the hired workers.

Petitioner argues (Pet. 23-25) that, because it has complete control over the disposition of the crops, and because it has an "entire integrated operation," the economic reality is that it acts solely for its own benefit. However, even if the growers have no control whatsoever over petitioner's activity, they nevertheless remain vitally interested in that activity until the final profits are realized. The court of appeals correctly noted (Pet. App. 39 n.7) that, because petitioner's profit is taken "off the top," its risk of loss is "negligible compared to that of the growers." In such circumstances, it cannot be maintained that petitioner's activity is solely for its own benefit.[4]

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[4]Petitioner maintains (Pet. 21) that the fact that it is a profit-making corporation is somehow relevant to the exemption question. It is true that in that respect petitioner differs from the nonprofit corporation whose status was at issue in *Marshall* v. *Coastal Growers Ass'n*, 598 F. 2d 521 (9th Cir. 1979). But it was this very nonprofit character that was the basis for Coastal Growers' claim that it was not an entity separate from the farmers, but instead their alter-ego. The court rejected the claim for exemption, holding (*id.* at 524-525) that, in spite of its nonprofit character, Coastal Growers *was* an entity separate from the individual growers and that it conducted its activities on their behalf as well as its own. Here, petitioner's profit-making character and the fact that it serves both shareholder-growers

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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and non-shareholders alike make it even more distinct an entity than was Coastal Growers. Both shareholders and non-shareholders are entirely dependent on petitioner's activities.

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